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No. 91-1418

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM M. ABROMS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

LOOPER, REED, MARK & McGRAW
Incorporated
Attorneys For Petitioner

RANDALL B. WILHITE
Attorney of Record
MATTHEW T. HAGAN
Attorney

Nine Greenway Plaza
Suite 1717
Houston, Texas 77046
Telephone: (713) 877-6355

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The Petitioner hereby supplements his earlier filed Petition For Writ of Certiorari with additional argument based on new authority as it pertains only to his first question presented, to wit:

DOES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY, AS INTERPRETED BY THE COURT IN *WINSHIP*, REQUIRE THE GOVERNMENT TO PROVE THE ISSUE OF MATERIALITY UNDER 18 U.S.C. § 1623 TO THE TRIER OF FACT BEYOND A REASONABLE DOUBT?

ARGUMENT

The trial judge below determined that Petitioner's statements to a grand jury were material under 18 U.S.C. § 1623, instructed the jury accordingly, and thus committed plain error by not allowing the jury to decide whether the prosecution proved materiality beyond a reasonable doubt. Respondent's opposing brief erroneously relies upon the questionable precedential value of *Sinclair v. United States*, 279 U.S. 263 (1929), to assert that materiality, like the issue of pertinency addressed in *Sinclair*, should be treated as a question of law that does not have to be proved beyond a reasonable doubt. This Court has, however, explicitly held that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *See In re Winship*, 397 U.S. 358, 364 (1970).

Respondent argues that this Court expressly reaffirmed the principle of *Sinclair* in *Kungys v. United States*, 485 U.S. 759, 772 (1988), but provides no independent analysis of the issues addressed in *Kungys* to persuade this Court. In fact, Respondent fails to recognize that the statute at issue in *Kungys* does not provide for a trial by jury, see 8 U.S.C. 1451(a), and consequently this Court in *Kungys* did not have occasion to determine whether materiality is a question of fact to be decided by a jury. As the Supreme Court of New Jersey recently noted in analyzing *Kungys*, this Court "saw 'no reason to not follow what has been done with the materiality requirement under other statutes' ... primarily because there was no occasion to address either the constitutional jury-right issue or the related due-process

issue." *See State v. Anderson*, 603 A.2d 928, 933 (N.J. 1992).[1]

Petitioner, like the court in *Anderson*, is not convinced that this Court, when squarely addressing the issue presented herein, would find the rule of *Sinclair* reconcilable with *Winship*. *See Anderson*, 603 A.2d at 933. The *Anderson* court convincingly supports its decision by analyzing the flawed reasoning supporting the decisions of the many courts that have determined materiality in perjury cases to be a question of law for the court. As the *Anderson* court notes, many early cases erroneously equated materiality for purposes of the perjury statute with materiality as a preliminary determination on the admissability of evidence. *See id.* A ruling by a court in favor of materiality of evidence means only that the jury may consider the evidence. *See id.* at 934 (citing *People v. Clemente*, 285 A. D. 258, 136 N.Y.S.2d 202 (1954), *aff'd.*, 309 N.Y. 890, 131 N.E.2d 294 (1955)). However, the materiality of an allegedly false statement depends upon whether the statement could affect, as in Petitioner's case, the outcome or course of a grand jury proceeding; and as such, that determination is clearly within the province and capabilities of the members of a jury. *See Anderson*, 603 A.2d at 934.

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[1]The *Anderson* court recognized that materiality is an element of the offense of perjury, saw no compelling reason to withdraw from the jury the determination of materiality, and held that a provision in a New Jersey perjury statute declaring materiality to be a question of law violates the New Jersey constitution. 603 A.2d at 933-935.

Furthermore, the *Anderson* court justifies its position by recognizing that the rule of *Sinclair* became "well established" as later opinions cited it, apparently with little or no independent analysis. *See Anderson*, 603 A.2d at 934-935. Respondent seemingly invites this Court to do the same. Finally, the *Anderson* court renders its opinion with reference to the many recent cases that have reexamined the validity and soundness of *Sinclair* and emphasized the right of an accused to have the jury find all elements of a crime beyond a reasonable doubt. *Id.* at 934-35.[2]

Several other well-reasoned state court opinions have also concluded that a reliance on *Sinclair* is suspect. *See Commonwealth v. McDuffee*, 379 Mass. 353, 398 N.E.2d 463 (1979)(the *McDuffee* court saw no justification for removing the issue from the jury, reasoning that the complexity of a legal concept should not justify removing an element of a crime from the jury's determination where there are underlying factual determinations to be made); *see also People v. Figueroa*, 41 Cal.3d 714, 715 P.2d 680, 224 Cal.Rptr. 719 (1986); *and People v. Clemente*, 285

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[2]The *Anderson* court concurs with Judge Lynch's federal law analysis of the issue in *United States v. Taylor*, 693 F.Supp. 828 (N.D. 1988). The *Taylor* opinion evidenced Judge Lynch's conviction that materiality in perjury cases is a factual question to be submitted to the jury with proper instructions like other essential elements of the offense, unless the court rules, as a matter of law, that no submissible case is made out by the prosecution on the issue of materiality. 693 F.Supp. at 844 (citing *United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982)).

A.D. 258, 136 N.Y.S.2d 202 (N.Y. App. Div. 1954), *aff'd*, 309 N.Y. 890, 131 N.E.2d 294 (1955).

Respondent lastly proposes that *Winship* and *Sinclair* may be conveniently reconciled by characterizing materiality as an issue of law, which need not be submitted to the jury or proved beyond a reasonable doubt. Respondent's view fails, however, to give effect to the terms employed by Congress making materiality an expressed element of the offense of perjury under 18 U.S.C. § 1623, overlooks a jury's unquestionable qualifications to decide what could influence a jury's decision, *see Anderson*, 603 A.2d at 935, and ignores Petitioner's right to a jury in a criminal trial to decide all elements of the charged offense beyond a reasonable doubt. *Id.*; *see also Winship*, 397 U.S. at 364.

CONCLUSION

For the reasons stated in the original Petition and as supplemented herein, Mr. Abroms' Petition For Writ Of Certiorari should be granted.

Respectfully submitted.

Looper, Reed, Mark & McGraw,
Incorporated
Attorneys For Petitioner

Randall B. Wilhite
Attorney of Record
Matthew T. Hagan
Attorney